IN THE

Supreme Court of the United States

October Term, 1976
No. 76-69

EDWARD WALSH, as Trustee in Bankruptcy for PALMER DATA CORPORATION dba COMPUTERMINAL,

Petitioner,

vs.

UNITED STATES DISTRICT COURT, FOR THE NORTHERN DISTRICT OF CALIFORNIA,

Respondent,

BURROUGHS CORPORATION,

Respondent and Real Party in Interest.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Introduction.

Petitioner, Edward Walsh, trustee in bankruptcy for Palmer Data Corporation, doing business as Computerminal, has prayed that a writ of certiorari be issued to review the order of the United States Court of Appeals for the Ninth Circuit dated June 7, 1976. That order denied petitioner's request for a writ of mandamus to respondent United States District Court, for the Northern District of California, ordering the respondent to vacate its order of a new trial.

Opinions Below.

The orders and judgments of the courts below are printed in Appendices A through G to the Petition for Certiorari. Portions of the transcript of the hearing in the District Court on May 2, 1974, in which the grounds for setting aside the verdict of the first jury in this case are stated, are printed in Appendix 1 to this Brief.

Questions Presented.

1. In light of the strong policy against the granting of a writ of mandamus except in extraordinary circumstances, should mandamus be used to overturn a new trial order, which is properly left to the sound discretion of the trial judge?

2. Can petitioner rightfully claim violation of his Seventh Amendment right to trial by jury when that amendment plainly excepts judicial supervision, such as the new trial, which was recognized at common law?

3. In light of the complexity of the issues in this private antitrust suit, should respondent Burroughs Corporation be denied its right to a jury which is properly instructed and calculates damages reasonably?

4. Should the policy against review of interlocutory orders in piecemeal fashion be thwarted through the use of the extraordinary writ?

Statement of the Case.

A. Nature of the Action.

This is a private anti-trust action, brought under Section 4 of the Clayton Act (15 U.S.C. §15). Plaintiff-petitioner seeks damages allegedly caused by the defendant-respondent's alleged violation of Section 1 of the Sherman Act (15 U.S.C. §1).

B. Parties.

Plaintiff and petitioner is Edward Walsh, trustee in bankruptcy for the original plaintiff in this action: Palmer Data Corporation, doing business as Computerminal.

The respondent is the United States District Court for the Northern District of California; the defendant-respondent (real party in interest) is Burroughs Corporation.

C. Proceedings Below.

The complaint was filed in March, 1971. In March, 1974, after trial, a jury returned a verdict in favor of the plaintiff, and assessed damages at $1,270,500. The judgment was entered on March 13, 1974 (*See* Appendix D to Petition for Certiorari). In May of that year, the District Court granted a new trial on the issue of damages alone, on the grounds, among others, that the jury's assessment of damages was excessive, not supported by solid evidence, and to some degree the product of an emotional jury (*See* Appendix 1 to this Brief). The new trial order was filed on June 25, 1974 (*See* Appendix E to Petition for Certiorari).

The new trial on the damages issue began in October, 1974; in November, 1974, the jury returned a verdict of no damages. On February 12, 1975, at the motion of petitioner herein, the District Court ordered a new trial on all issues and assigned it to the Honorable Charles E. Wyzanski, Jr., Senior Judge, sitting by special designation (*See* Appendix F for Petition to Certiorari). The Court never explicitly stated the grounds for its order.

In January, 1976, the third trial commenced before Judge Wyzanski. After 5½ weeks, the jury returned

a verdict in favor of petitioner, and assessed damages at $1,162,000. Judgment was entered on February 6, 1976 (*See* Appendix G to Petition for Certiorari), at which time a briefing schedule for post trial motions was agreed to.

On April 28, 1976, the District Court denied respondent's motion for judgment notwithstanding the verdict and granted respondent's motion for a new trial. The Court held that it had improperly admitted evidence concerning one of plaintiff's damage theories, which constituted nearly half of plaintiff's total damage claim, and that it was improper, therefore, to have instructed the jury on such claim. As a second and independent ground, the District Court found the jury's assessment of damages so excessive, even as to the remaining element of plaintiff's damage theory, as to warrant a retrial (*See* Appendix B to Petition for Certiorari, at 7-9). Moreover, in light of the two grounds set forth above, the District Court did not find it necessary to rule on all the grounds set forth by respondent in its motion for a new trial, stating:

> "Nor does justice demand that plaintiff be allowed to keep so much of its verdict as may

> relate to liability. While this court has reviewed scrupulously the record to search out what is the most favorable analysis from plaintiff's view of the evidence, the court has not said, and does not now say, that taken as a whole the evidence is sufficient to withstand the defendant's motion to set aside the verdict in every aspect on the ground that it is against the overwhelming weight of the evidence as to liability. However, it is unnecessary for the court to pass on such a contention, inasmuch as the verdict is fatally vulnerable on the issues of causation and damages." (*Id.*, at 10).

Petitioner then filed a Petition for a Writ of Mandamus in the Ninth Circuit Court of Appeals, seeking reinstitution of the jury verdict which the trial judge had found seriously tainted by error. Petitioner, who had already successfully sought a new trial in the present action, claimed (as he does in the present petition) that the latest new trial order deprived him of his right to trial by jury. The Ninth Circuit denied the petition (*See* Appendix A to Petition for Certiorari).

Summary of Argument.

Petitioner asks this Court to review the refusal of the Court of Appeals for the Ninth Circuit to issue a writ of mandamus to the United States District Court for the Northern District of California. Respondent respectfully submits that the Court of Appeals properly refused to apply that extraordinary remedy because the District Court acted within its sound discretion in invalidating the excessive verdict of an erroneously instructed jury and ordering a new trial.

The petition should be denied because it has raised no substantial constitutional issues. Petitioner alleges that his Seventh Amendment right to a jury trial has been violated because two different District Court judges have ordered new trials in the present action. He relies upon *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959), and *Kanatser v. Chrysler Corp.,* 199 F.2d 610 (10th Cir. 1952), cert. denied 344 U.S. 921 (1953). Unlike *Beacon Theatres,* however, this is not a case in which a trial judge has demanded to hear by himself an issue which is properly left to a jury. On the contrary, three different jury panels have heard the case before two different trial judges, and still another jury is to be impaneled to once

again hear the entire case. If they are properly instructed and compute damages rationally, that new jury will be the ultimate trier of facts in this action. Furthermore, unlike *Kanatser,* this case does not involve an untimely order of a new trial far beyond the jurisdiction of the trial judge. In the instant case, the District Court acted speedily and within its sound discretion to set aside a verdict on well accepted, and indeed compelling, grounds.

Petitioner's only basis for seeking the extraordinary remedy of mandamus to upset this traditionally recognized, discretionary order is the number of times the instant case has had to be tried. It was petitioner, however, who successfully moved for the recent third trial. As petitioner was well aware when he sought that retrial, the Seventh Amendment right to a trial by jury is not absolute; it is instead expressly subject to exceptions recognized at common law. Judicial supervision to insure proper instruction and rational jury determinations is a well recognized common law exception, and an integral part of the amendment's guarantees.

Finally, respondent submits that petitioner will have ample remedies through the standard appellate process should he be defeated in the District Court upon retrial.

Statutes, Constitutional Provision and Rules Cited.

The texts of the Seventh Amendment to the Constitution of the United States; 28 U.S.C., Section 1291; Rule 30 of the Revised Rules of this Court; and Rule 59 of the Federal Rules of Civil Procedure are set out in Appendix 2 to this Brief.

ARGUMENT.

A. Mandamus Is an Extraordinary Remedy Befitting Only Rare and Unusual Judicial Errors.

The common law writ of mandamus is a remedy which should be granted by the Courts of Appeals only sparingly and in extraordinary circumstances. *Will v. United States,* 389 U.S. 90 (1967); *Supreme Court* Rule 30 (28 U.S.C.). The extraordinary writs do not reach cases in which district courts merely err in ruling on matters within their jurisdiction, as opposed to exceeding or refusing to exercise that jurisdiction. *Chandler v. Judicial Council of Tenth Circuit,* 398 U.S. 74, 115 *rehearing denied* 399 U.S. 937 (1970) (Harlan, J. concurring); nor do they "run the gauntlet [sic] of reversible errors," *Bankers Life and Casualty Co. v. Holland,* 346 U.S. 379, 382 (1953). Their office is merely to confine the lower court to the sphere of its discretionary power. *Id.* at 383.

B. The Trial Judge Neither Erred nor Exceeded His Jurisdiction by Granting a New Trial to Respondent.

The present case does not involve any act in excess of jurisdiction by the District Court. Upon timely motion by respondent Burroughs, pursuant to Rule 59 of the Federal Rules of Civil Procedure, the Court granted a new trial.

The power of a trial judge to grant a new trial has long been recognized by this Court. *See, e.g., Cone v. West Virginia Pulp and Paper Co.,* 330 U.S. 212, *motion to amend mandate denied* 331 U.S. 794 (1947); Fed.R.Civ. P. 59. As Judge Parker noted for the Fourth Circuit in *Aetna Casualty and Surety Co. v. Yeatts,* 122 F.2d 350, 354 (1941):

> "While according due respect to the findings of the jury, [the trial judge] should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice to require."

In the instant case, the motions for new trials were granted on well recognized grounds. The Court after the third trial granted respondent's motion for a new trial on at least two alternative theories: first, that the Court improperly admitted evidence and instructed the jury on elements of damage claimed by petitioner (Appendix B to Petition for Certiorari, at 7, 8); and second, that the jury's verdict on damages would have been excessive, even if the evidence presented by petitioner had been admissible (*Id.,* at 8, 9). Having held that the verdict was "fatally vulnerable in the issues of causation and damages," the judge below did not feel it necessary to consider other (liability) aspects of respondent's motion.

We note that the first trial judge had also found the jury's assessment of damages excessive (Appendix 1 to this Brief). After a verdict for respondent Burroughs in the second trial, upon motion by petitioner herein on a great number of grounds, the District Court granted a new trial on all issues (Appendix F to Petition for Certiorari).

The grant of a new trial on these grounds is no abuse of discretion. Indeed, the issuance of a new trial is necessarily warranted by an erroneous instruction, when that error is prejudicial. *Callen v. Pennsylvania Railroad Co.,* 332 U.S. 625 (1948). The trial judge, in his sound discretion, is free to order a new trial when a jury's verdict on damages is inadequate or excessive. *See, e.g., Holmes v. Wack,* 464 F.2d 86 (10th Cir. 1972); *see also Affolder v. New York,*

Chicago & St. Louis Railroad Co., 339 U.S. 96 (1950). Thus the two trial judges in the instant case have acted within the sphere of their discretionary power, and the writ of mandamus is not a proper remedy. *Will v. United States, supra* at 95. At most, their orders (including the order granting petitioner's motion for a new trial after the second trial of this action), might constitute errors in matters clearly within their jurisdiction, which may be challenged in the normal appeals process.

C. The Proper Granting of a New Trial Raises No True Question Regarding Petitioner's Seventh Amendment Right to Trial by Jury.

Against petitioner's blanket assertions that his Seventh Amendment right to a trial by jury has been abused, one must view the historical relationship between the amendment and new trial grants. The amendment forbids the re-examination of facts tried by a jury, except as was allowed "according to the rules of the common law." Deeply ingrained in the common law system which the Seventh Amendment protects is the historic safeguard of judicial supervision. This Court has often noted that the power of a judge to order a new trial was well known at common law, and is therefore permissible and proper. *Cone v. West Virginia Pulp & Paper Co., supra; Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940); *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931).

It is ironic that petitioner contends his constitutional right has been ignored. Petitioner was well aware of the propriety of the safeguard of judicial supervision when he moved for and was granted the third of the three trials which he now claims are delaying the just and speedy determination of his suit. Until

a jury properly and rationally decides the issues presented to it in any case, there is no recourse to the trial judge other than to set aside a faulty verdict. Otherwise, no one, including the respondent in this case, Burroughs Corporation, receives the Seventh Amendment guarantee.

Petitioner seeks one of the most powerful tools at the disposal of this Court to tamper at a premature stage with the delicate machinery of trial by jury. His invocation of the Constitution to support that request is in itself a contradiction.

D. Mandamus Has Not Been Used, as Petitioner Suggests It Has, to Overturn a Timely Order for a New Trial Because a Jury Assessment of Damages Was Excessive.

We emphasize at the outset that the judge in the latest trial found the verdict of the jury fatally vulnerable on the issues of causation *and* damages, and thereby found it unnecessary to consider respondent's arguments concerning liability (*See* Appendix A to Petition for Certiorari, at 10). Such a ruling does not entitled petitioner to be heard in this Court at this time.

Petitioner cites two cases as authority for his request for certiorari: *Beacon Theatres, Inc. v. Westover*, 252 F.2d 864 (9th Cir. 1958) and 359 U.S. 500 (1959), and *Kanatser v. Chrysler Corp.*, 199 F.2d 610 (10th Cir. 1952), cert. denied 344 U.S. 921 (1953). Nothing in those opinions even suggests that extraordinary writs should be issued with so free a hand as petitioner here warrants.

According to petitioner, the facts in the *Beacon Theatres* case "pale" in comparison with those presented in the instant case. Indeed, the converse is true. The

trial court in *Beacon Theatres* had insisted on hearing, without any jury, a number of private antitrust claims, both equitable and legal, which contained common issues of fact. Since the petitioner had the right to have each issue in its complaint under the Sherman Act (15 U.S.C. §1) heard by a jury, this Court declared that the Court of Appeals erred in refusing to issue a writ. In insisting upon hearing the equitable claims himself, and deciding issues of fact which would later have the effect of estoppel elsewhere, the trial judge was found to have infringed on the petitioner's right to a trial by jury. This Court declared that right was to be preserved inviolate. 359 U.S. 500, 511.

In the instant case, the trial judges have not strayed from that command. They have not attempted to remove the factual issues of petitioner's alleged cause of action from the jury because of any asserted jurisdictional dominance. Rather, recognizing the jury's power to decide issues of fact, one of the judges has concluded that as a matter of law, a crucial element of the damages sought to be proved by petitioner cannot rationally be inferred from the evidence produced at trial. (Appendix B to Petition to Certiorari, at 8.) Recognizing the propriety of a jury hearing of the instant case, both judges have simply concluded that the damages found by the jury were so irrational as to warrant a hearing before a more reasonable panel (*Id.*, at 8, 9; Appendix 1 to this Brief; Appendix F to Petition for Certiorari). The verdicts have been set aside but, unlike the *Beacon Theatres* case, the issues in the instant controversy are to be retried before another jury.

Kanatser v. Chrysler Corp., supra, is similarly inapposite. Petitioner cites the case as if standing for the

proposition that one's right to a jury trial is infringed whenever a judge orders a new trial and declares that a damage award above a particular amount cannot be allowed to stand. In fact, however, the Court in *Kanatser* granted the petition for a writ of mandamus despite the normal non-appealability of a new trial order because the new trial was granted on the Court's own motion, six months after entry of judgment, on a ground not asserted in a timely motion for new trial. This was found to be in excess of the jurisdiction of the District Court. 199 F.2d at 615. There is no claim in the present case that the District Court acted in excess of its jurisdiction in granting respondent Burroughs' timely motion for a new trial.

If petitioner's claim is accepted, new trials for excessive damages would be utterly done away with; moreover, the practice of remittitur would need to be abolished as well. For each of those recognized practices requires the trial judge to evaluate the jury's finding of damages according to his own perceptions of how a properly functioning jury would have acted. *See, e.g., Arkansas Cattle Co. v. Mann,* 130 U.S. 69 (1889); *Holmes v. Wack, supra;* 6A Moore's Federal Practice ¶¶59.05 [3], 59.05[6]. In the words of the Ninth Circuit in *Murphy v. United States District Court,* 145 F.2d 1018, 1020, cert. denied 325 U.S. 891 (1945):

> "A federal District Judge not only has the power and authority but is charged with the duty and responsibility to set aside the verdict of a jury and to grant a new trial when in his judgment and discretion the amount of compensation awarded is excessive. The granting of a new trial is discretionary with the court and subject to no fixed rule except a consideration of what is just."

E. Petitioner Has Remedies Available Through the Normal Appellate Process.

The issuance of an extraordinary writ is also inappropriate because the substantial, adequate remedies provided by the normal appellate process will be available to petitioner once a final decision in the case has been reached. This is the clear rationale of 28 U.S.C. §1291, limiting the jursidction of the Courts of Appeals to appeals from "final decisions" to prevent the piecemeal adjudication of recurring issues by appellate courts far removed from the factual issues of the case. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

Thus for sound reason, Courts of Appeals are generally loathe to interfere with the granting of new trials until after retrial and final judgment. *Dillard Department Stores, Inc. v. Fidelity Union Life Insurance Co.*, 508 F.2d 331 (5th Cir. 1975); *Wagner v. Burlington Industries, Inc.*, 423 F.2d 1319 (6th Cir. 1970); *Douglas v. Union Carbide Corp.*, 311 F.2d 182, 185 (4th Cir. 1962). A writ of mandamus in the instant case would cast doubt upon that sound policy.

Conclusion.

For the foregoing reasons, respondent Burroughs Corporation prays that the petition of petitioner Edward Walsh for a writ of certiorari be denied.

Dated: August 10, 1976.

Respectfully submitted,

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Attorneys for Respondent Burroughs Corporation.

APPENDIX 1.

In the United States District Court, for the Northern District of California.

Before: Hon. Stanley A. Weigel, Judge.

Edward Walsh for Palmer Data Corp., Plaintiff, vs. Burroughs Corporation, Defendant. C 71-479 SAW.

REPORTER'S TRANSCRIPT

Thursday, May 2, 1974

THURSDAY, MAY 2, 1974

THE CLERK: Civil case 71-479, Edward Walsh for Palmer Data Corporation versus Burroughs Corporation.

MR. GILLAM: Max L. Gillam for the moving party and defendant Burroughs Corporation.

MR. ALIOTO: Joseph M. Alioto for the plaintiff, if it please the Court.

* * *

MR. ALIOTO: I just have one question, further question if I might, Your Honor. Could the Court advise the plaintiff as to the grounds for new trial on the damages, whether they were—whether the Court is of the view they were excessive or whether they were unsupported or what it was so that we can cure whatever the Court's deficient—considers the deficiency is in the new trial, or attempt to?

THE COURT: Well, there were a large number of reasons why I came to the conclusion that the motion for a new trial should be granted on the question of damages and I won't undertake to state them all. In general, I think the award was exceptionally excessive. I think it was not supported by any solid

evidence. I think it may have been, to some degree, the product of over-emotion of it; an over-emotional jury, not due, however, I want to add, due to anything on your part. I admire your conduct in the case.

MR. ALIOTO: Thank you.

THE COURT: Those are just a few of the reasons which come to mind. Basically, I just think the evidence is not there to sustain the award of damages.

MR. ALIOTO: Would the evidence be admissible in the new trial, Your Honor, so that I can—

THE COURT: Well, I don't want to make any—I wanted to be courteous and respond to your inquiry, but there are a number of reasons and I think your own study of the law will provide you with answers, but in any case, let's leave it unless you gentlemen wish otherwise, in which case I will consider it, but we'll leave the question of a date for the new trial at large and you get together and see if you can't agree on something on the calendar and work it out with counsel.

* * *

APPENDIX 2.

Statutes, Constitutional Provision and Rules Cited.

The Seventh Amendment to the Constitution of the United States provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Section 1291, 28 U.S.C., provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Rule 30 of the Revised Rules of this Court provides:

> "The issuance by the court of any writ authorized by 28 U.S.C. § 1651(a) is not a matter of right but of sound discretion sparingly exercised. See the following cases, which are cited by way of illustration only: Ex parte Bollman and Swartwout, 4 Cranch 75; Ex parte Peru, 318 U.S. 578; Ex parte Abernathy, 320 U.S. 219; Ex parte Hawk, 321 U.S. 114; House v. Mayo, 324 U.S. 42; U.S. Alkali Export Assn. v. United States, 325 U.S. 196; DeBeers Consol. Mines v. United States, 325 U.S. 212; Ex parte Betz, 329 U.S. 672; Ex parte Fahey, 332 U.S. 258."

Rule 59 of the Federal Rules of Civil Procedure provides:

"New Trials; Amendment of Judgments.

"(a) GROUNDS. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

"(b) TIME FOR MOTION. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

"(c) TIME FOR SERVING AFFIDAVITS. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

"(d) ON INITIATIVE OF COURT. Not later than 10 days after entry of judgment the court

of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

"(e) MOTION TO ALTER OR AMEND A JUDGMENT. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."